

**The Joint Examination Board
Basic English Law Paper : November 2004**

Examiner's Comments

General Comments

It is important that Candidates follow the instructions on the examination paper and ensure that they answer the correct number of questions from each section. Every year candidates are reminded to answer the question but a number of candidates still continue to attempt to put down everything they know about a particular topic in an answer rather than applying that knowledge to the question and its facts. This often demonstrates the candidate's lack of understanding as to how the legal principles are applied in practice. In addition it is a waste of a candidate's time in what is a time-pressured examination. It is a crucial factor when determining borderline candidates whether or not their paper demonstrated a true understanding of the law and its application.

[It was clear from the papers that candidates often showed strength in different questions and topics and weaknesses in others. Each candidate should first attempt those questions with which they are most comfortable and about which they feel most knowledgeable. Of that category candidates should first answer those from Part B (which carry higher marks per question) and then those from Part A leaving the questions about which they are less comfortable until the end.]

Part A

1. Describe the functions and roles, if any, of the following people in defending a High Court action for Design Right Infringement :

- a) Solicitor;**
- b) Barrister;**
- c) Jury;**
- d) Judge**

(10 Marks)

Answer

- Solicitor : client contact, general advice, case assessment, filing procedural documents & pleadings (in conjunction with the Barrister), interim court applications including case management conferences, disclosure, witness interviews, evidence preparation and response, trial, effect of advocacy qualifications.
- Barrister : tactical advice and case assessment (working in conjunction with the solicitor), settling pleadings and procedural documents, advocacy at all hearings before the Court (both trial and interim), settling evidence, preparation for trial including skeleton arguments.
- Jury : No role.

- Judge : Before trial – case management role, presides over interim applications. During/post trial – rules on procedural applications, determines fact and law, assesses evidence, delivers judgment.

Comments

This question was attempted by the majority of candidates but on the whole was poorly answered. Candidates were able to identify the obvious role of each of the solicitor, barrister and judge, namely preparation for the solicitor, advocacy for the barrister and judgment from a judge. To have passed this question candidates were expected to show a greater understanding of the roles of the different personnel beyond that which an ordinary lay person would understand.

- 2. Explain what is meant by:**
- a) Legal Professional Privilege;**
 - b) Litigation Privilege**
 - c) Without prejudice communications.**

(10 Marks)

Answer

- Generally privilege protects the client from having to give disclosure of such information to third parties. Privilege is applicable during disclosure in litigation but also protects the advice in other circumstances.
- Legal professional privilege : Applies to communications (written or oral) between advisor and his client with the purpose of obtaining legal advice regarding legal rights/obligations. Right of the client and may only be waived by the client. Narrower interpretation since the Three Rivers case as to who is the “client”. Automatic.
- Litigation Privilege : Applies to communications (written or oral) between advisor, client and a third party when made during or in serious contemplation of litigation. Client’s right and only the client may waive the right. Automatic.
- Without prejudice. Form of privilege existing between parties in a dispute although it does not need to be formal litigation. Comments/discussions made without prejudice may not be used to prejudice the writer in court. Enables the parties to discuss matters more freely and openly without risk of prejudice. Arises only if there is a genuine attempt to settle the dispute. Privilege may only be waived with both parties’ consent or used to prove an agreement or enforce terms of settlement.

Comments

This question was popular with candidates. Most candidates knew the basics of without prejudice correspondence but the question did not require a discussion (other than maybe a cross reference to distinguish it) of the provisions of Part 36 of the CPR. Candidates were able to identify legal professional privilege as relating to communications between the advisor and client but there was some confusion as to the difference between that and litigation privilege. Litigation privilege is not the same as immunity from prosecution for statements made in Court.

- 3. Describe the differences between litigation and arbitration and the advantages and disadvantages of each.**

(10 Marks)

Answer

- Litigation : formal and regimented procedure. Tools include statements of case, disclosure, requirements to provide further information, cross-examination of witnesses. Forum administered by legally qualified/trained judges with experience. Precedent providing greater certainty of decisions. Judgments enforceable abroad. Greater scope of remedies. Public, cost effective and speedy.
- Arbitration : less formal environment and with fewer procedural rules. Varying degrees of formality and obligations on the parties depending on contractual agreement for arbitration. Confidential. Convenient. Often arbitrator may be an expert in the relevant field. Can be expensive and slow. Less certainty as decision dependant on the arbitrator's sole decision.

Comments

Very few candidates attempted this question. Candidates' knowledge of arbitration was limited and there was confusion between arbitration and mediation. Although both arbitration and mediation are alternative dispute resolution forums (ADR) they are very different in practice and effect and candidates must understand this difference. Generally candidates were able to describe litigation in reasonable detail.

4. Identify and for each one explain with examples each of the four essential requirements necessary for the formation of a valid contract.

(10 Marks)

Answer

- Offer. An unequivocal offer of a promise. Capable of acceptance. Contrast with invitation to treat. Note differences in collateral/unilateral contracts.
- Acceptance. Unqualified acceptance of the full terms of the offer. Acceptance to be communicated in accordance with offer. Compare with a counteroffer. Positive action. Communication to the offeror. Acceptance by conduct. Note differences in collateral/unilateral contracts.
- Consideration. "A detriment in exchange for the promise". Must not be past and must move from promisee. Need not be money. Discussion as to value/adequacy of consideration.
- Intention to create legal relations. Discussion as between domestic and commercial relations.

Comments

This question was attempted by every candidate. All candidates were able to identify the four requirements for a contract and were able to provide basic descriptions of each element. However, there was a clear difference between those who had read deeper into the subject thereby being able to discuss each element in greater detail than those who simply had a basic understanding of the topic. It is not enough, simply to know the four elements. Candidates must familiarise themselves with the principles governing each element of a contract rather than providing a dictionary explanation of offer and acceptance.

5. Identify sources of English law and provide a concise explanation of three of the sources.

(10 Marks)

Answer

- Statute : Parliamentary process, sovereignty, courts may only interpret, repeal only by parliament.
- Delegated Legislation : Approved by minister/elected person in accordance with statute. Limited in scope as derogated by statute, interpreted by Courts who may declare it ultra vires.
- EC Directives : European commission, approved by EU parliament and require implementation in UK legislation. Direct effect if not implemented.
- EC Regulation : European council, Direct effect
- Case Law/Precedent : Ratio/Obiter, Hierarchy of court systems, rules of precedent.
- Custom : Time immemorial

Comments

This question was also popular and was answered by every candidate. Most candidates were able to identify the sources of English law. The question required a description of only three of the sources. Those candidates who provided descriptions of more than 3 sources wasted valuable time since marks were only available for three descriptions. Most candidates were able to provide basic information about each source but to achieve higher marks a more detailed explanation of each was required as to its formation, effect and ranking.

Part B

6. a) **Identify and describe with examples the different categories of evidence admissible at trial.**

(10 Marks)

- b) **Summarise the methods by which evidence may be presented.**

(5 Marks)

Answer

- Direct Evidence (first hand fact evidence), Hearsay Evidence (“second hand” evidence, admissibility rules), Opinion Evidence (from those qualified to give opinion e.g. expert, allowable from non-expert if facts are as perceived by a witness), Survey (specific rules on independence etc), Documentary/Real.
- Witness statement, statutory declarations, affidavits, oral testimony, live video, recorded testimony, telephone, depositions, physical exhibits.

Comments

Candidates were able to score relatively easily on this question since it predominantly required a recital of the different categories of evidence and methods by which evidence could be presented. The question did not require any analysis of facts or application of legal principles to facts but rather required the candidate to show an understanding in general terms of the categories of evidence. Most candidates were able to identify key categories of evidence such as direct and hearsay and were also able to provide reasonable examples to support their explanations.

Although this was one of the least popular questions from Part B, on the whole, it was well answered.

7. **A local musician, Alice, singing her own composition is overheard by Pete, a famous record producer. Pete offers to buy the song, the copyright and all rights in it for £5,000. Pete pays cash but Alice does not provide a receipt.**

Later that week Pete, whilst attending a local recording studio, overhears Alice recording the same song. He demands that she stop playing it. Alice refuses saying that she owns the copyright and has just spent the £5,000 recording it so that she can release the record at the end of the week. Pete is very concerned because his new boy band have just recorded the same song and are about to be launched the following week.

- a) **What rights, if any, does Pete have in the song?**

(5 Marks)

- b) **What legal steps, if any, can Pete take to improve his position and prevent Alice from releasing the song?**

(10 Marks)

Candidates are not expected to discuss the merits or basis of a copyright infringement action.

Answer

- Oral contract existed. Legal title in copyright only assigned by written instrument. Pete holds equitable interest. Alice holds legal title on bare trust for Pete.
- Pete should secure legal title. Seek written assignment from Alice failing which seek an order from the court to force Alice to assign or appoint a signatory to assign on behalf of Alice.
- Seek an injunction. Governed by the principles in American Cyanamid e.g. arguable case, balance of convenience/risk of damage to both parties, unquantifiable damages/damages as an inadequate remedy, public policy, “clean hands”, status quo, cross undertakings in costs, speed. Series 5.

Comments

Most candidates recognised the requirement under the Copyright, Patents and Designs Act 1988 that the legal title in copyright could only be assigned by a written instrument and that Pete held the equitable interest in the copyright.

Many candidates suggested that Pete could improve his position by suing Alice for breach of contract to prevent her from recording the song. This is unlikely since there was no contractual obligation on Alice not to use the song. The contract only dealt with assignment of the copyright. Therefore, Richard’s remedy could only be obtained through copyright infringement, which was explicitly excluded from the question. Accordingly, candidates were expected to discuss the principles in relation to obtaining an interim injunction and applying those principles to the facts of the question.

8. **Richard and Jason decide to take a road trip around England in Richard’s old car. However, not five minutes out of their village Richard drives the car into a ditch at speed causing Jason to suffer a broken leg.**
- a) **What would Jason need to prove in order to obtain compensation from Richard?**
(8 Marks)
- b) **Would it make any difference to Jason’s claim or his damages if:**
- at the time of the crash Jason had undone his seatbelt and tried to climb into the back of the car to get his mobile telephone?**
 - Jason was a professional footballer?**
 - Jason also complains of a stiffness in his neck like whiplash which is similar to the sprain he suffered the previous week during a match.**
- (7 Marks)

Answer

- Duty of care. “Neighbour principle”, when does it arise, conditions to consider when it arises.
- Breach of the Duty. Standard expected. Factors taken into consideration in determining standard.
- Damage. Causation. Foreseeability/Remoteness
- Contributory negligence on the part of Jason which would have an effect on the level of damages Jason received. Possible suggestion that Jason may have been the cause of the action in which case negligence rests exclusively with Jason.
- Will not affect the negligence claim but has an effect on damages. Basic principle of damages is to put the party back in the position it would have been in were it not for the breach. Actual and foreseeable loss.

Comments

On the whole, this question was well answered with most candidates identifying the basic requirements necessary to establish negligence and explaining the basic principles behind each requirement. Candidates also successfully identified the main issues in part B of the question. Although candidates were able to identify the key topics additional marks were also available for an explanation of those issues and their application to the facts of the question.

9. **Bernard, a celebrity chef, is the major shareholder in an established Michelin starred restaurant in London frequented by many celebrities and with a three-month waiting list. His restaurant is particularly famous for its “Blackened Steak” dish with the source of the beef being a closely guarded secret but widely advertised as exclusive to Bernard’s restaurant.**

The Restaurant Group plc, decide to open a steak house close by called “Steak Bar” and want to advertise their signature dish called the “Charcoal Blackened Steak”. The Restaurant Group have started to run a series of advertisements in the London press as follows:

Advert 1 “Eat the Charcoal Blackened Steak at Steak Bar. No three month waiting list unlike Bernard’s”

Advert 2 “Eat the Charcoal Blackened Steak at Steak Bar. No three month waiting list, fresher steaks and better value for money than expensive Bernard’s”

Advert 3 “Eat the Charcoal Blackened Steak at Steak Bar. Avoid the three month waiting list and donkey meat they pass off as steak at Bernard’s”

- a) **Bernard is angry and he seeks your advice as to what, if any, grounds for legal action he has in respect of each advertisement.** (10 Marks)
- b) **Would it make any difference to your answer if:**
- (i) **the Restaurant Group believed the advertisements?**
 - (ii) **The advertisements were still in draft and had not been printed?**
- (5 Marks)

For the purposes of this question you are not expected to advise on any registered trade mark or passing off issues.

Answer

- False statement, published, malice and damage – note also the application of s. 3 of the Defamation Act.
- Consider also DSG v. Comet – on the issue of malice and “advertising puff”
- Advert 1 : Statement is truthful and therefore no action.
- Advert 2 : Question whether truthful and if not whether it would have been taken seriously or assumed to be advertising puff, was there malice?
- Advert 3 : Likely to be malice and statement is untrue. Malicious falsehood likely to be established but consider DSG/Comet and whether public would take it seriously. Consider also defamation claims by Bernard
- Truth could have an effect on malice subject to recklessness of the party making the statement.

- If advertisements still in draft the publication element may be lacking. Question however, who had the draft adverts – were they with the printer? Arguably potential for quia timet action if Bernard knew of draft advertisements.

Comments

This question was very popular with candidates and on the whole was answered well. Candidates were able to accurately identify the main elements necessary to establish malicious falsehood and were able to apply the test to the facts in issue. Candidates also obtained a bonus mark for the correct assessment of Bernard's potential ability to bring proceedings for defamation in his own name.

However, the answers from candidates to part B of the question demonstrated that some did not fully understand the individual requirements for malicious falsehood and in particular the interaction of knowledge, intention and recklessness when considering malice.

10. In the Civil Procedure Rules:

a) What is meant by the Overriding Objective and what obligations does it place on the court user and the Court?

(9 Marks)

b) Identify each of the three "tracks" to which cases may be allocated and for each one briefly explain the effects of each track on a case

(6 Marks)

Answer

- Deal with cases justly including; (a) ensuring the parties are on an equal footing; (b) saving expense; (c) dealing with the case proportionately having consideration to (i) the amount of money involved, (ii) the importance of the case, (iii) the complexity of the issues, and (iv) the financial position of each party; (d) ensuring the case is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court' s resources, while taking into account the need to allot resources to other cases.
- The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules, or (b) interprets any rule.
- The parties are required to help the court to further the overriding objective.
- The court must further the overriding objective by actively managing cases
- Small Claims : <£5,000, limited costs recovery, informal, no disclosure, evidence curtailed, no experts generally, informal hearing, no need for representation
- Fast Track : Variable financial limit, speedy trial – 30 weeks from directions, early CMC and fixing of trial, limited costs, disclosure and witnesses. Rigid procedure.
- Multi Track : Cases >£15,000 and/or complex law. Flexible procedure, greater disclosure, evidence aspects and costs recovery.

Comments

This question was answered by almost every candidate and on the whole was well answered with most candidates scoring in excess of half marks. Whilst candidates were able to identify the different tracks to which cases are assigned candidates were less clear in the detail as to the effect of each track. The

majority of the marks available for Part B were in relation to an explanation of each track rather than simply the identification of the three tracks.